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IN THE

Supreme Court of the United States

OCTOBER TERM 1957

No. 878

Mrs. Woodrow Sapp, Mrs. James H. Tyre
and Mrs. Leroy Beckham, Sr.,
Petitioners,

—vs—

ATLANTIC COAST LINE RAILROAD COMPANY,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY SATEMENT OF QUESTIONS PRESENTED

The Petitioners seek access to this Court on the ground that under the evidence, when aided by the prima facie presumption statute of Georgia, the jury was authorized to find in their favor; and this Court is asked to review and weigh the evidence and render a decision contrary to the decisions of the Georgia courts and contrary to the decision of the Court of Appeals of the Fifth Circuit which was based upon the law clearly laid down by the Georgia Courts.

The sole and only real question is:

Have Petitioners clearly demonstrated that the Court of Appeals has decided an important question of Georgia law in conflict with the decisions of the Supreme Court of Georgia?

The petition should be denied because:

1. No reason is shown to justify this Court in granting certiorari.

2. The decision of the Court of Appeals was right.

ARGUMENT

1. No reason is shown to justify this Court in granting certiorari.

The Court of Appeals reviewed the entire evidence and applied the applicable Georgia statutes, as construed by the highest courts in that State.

This Court has emphatically stated to the bar that "We do not grant a certiorari to review evidence and discuss specific facts."

United States v. **Johnston**, 268 U.S. 220, 227, 69 L. ed. 925, 926;

Houston Oil Company v. **Goodrich**, 245 U.S. 440, 62 L. ed. 385;

Southern Power Company v. **North Carolina Public Service Company**, 263 U.S. 508, 68 L. ed. 413;

General Talking Pictures v. **Western Electric Co.**, 304 U.S. 175, 178, 82 L. ed. 1273.

The only deviation from this practice has been in cases arising under the Federal Employers' Liability Act, where the Court has relaxed the rule apparently upon the theory that those cases involve the assertion of Federal rights governed by Federal law.

Schulz, Admrx. v. **Pennsylvania RR. Co.** (1956), 350 U.S. 523, 100 L. ed. 668 (1-2).

In cases arising under the Federal Employers' Liability Act this court has relaxed the rule with respect to inferences to be drawn from the evidence, and has held that the jury is the sole arbiter of disputed issues of fact. That is not the law of Georgia which governs this case.

This case does not involve a decision by a state court of a question arising under a federal statute, nor does it involve the assertion of a federal right governed by federal law.

Nor is this a case where a court of appeals has decided an important state question in conflict with applicable state law.

Nor is this a case which has decided an important question of federal law which has not been, but should be, settled by this Court, nor is it one that has decided a federal question in conflict with the applicable decisions of this Court.

It is merely a case where an automobile occupied by three young men was driven into the side of a train moving in a regular and ordinary manner over a highway crossing. The Court of Appeals decided that no legal proof of negligence was made against the railroad.

The petition does not measure up to the requirements of Rule 19 of this Court.

United States v. Rimer, 220 U.S. 547, 55 L. ed. 578;

Magnum Import Co. v. De Spoturno Coty, 262 U.S. 159, 67 L. ed. 922, 924;

Southern Power Co. v. North Carolina Public Service Co., supra;

Rice v. **Sioux City Cemetery**, 349 U.S. 70, 99 L. ed. 897, 901.

It is not the province of this Court to review the facts and the evidence at the behest of every dissatisfied litigant. This is a simple tort action between private litigants. The case involves no such important principle of law or great public question as would justify consideration by this Honorable Court. Petitioners merely wish this Court to re-examine the evidence and substitute its judgment for that of the court below.

2. The decision of the Court of Appeals was right.

These are the salient facts:

Each plaintiff is a mother suing for the death of her son. The three young men were riding in an Oldsmobile 88 automobile driven by Beckham, a little after midnight, when the automobile was driven into the side of the 83rd car of a 92 car freight train, where the railroad crossed U. S. Highway No. 25, as the train moved normally from Brunswick to Waycross. Although some fog was shown, one of Petitioners' witnesses who was 150 feet from the crossing without the aid of a light could see the moving cars as they passed over the crossing. Another witness for the Petitioners disproved that there were any obstacles around the crossing that would obscure the cars passing over the crossing. The driver and at least one of the others were familiar with the crossing, having passed over it twice within an hour prior to the accident.

The Court of Appeals Correctly held that the evidence was insufficient to show negligence on the part of the railroad.

The Georgia courts have laid down the rule that some unusual condition must exist at a crossing before an automobile driver will be excused for not seeing a thing as obvious as a standing or moving train. Or, before a railroad is under a legal obligation to give added warning of its presence. The rule is one of common sense—for it holds that no warning need be given to a person of prudence of a thing plainly visible within the range of the statutory headlight requirements.

Savannah Railway v. **Newsome,** 90 Ga. App. 390, 83 S.E. 2d 80;

Mann v. **Central of Georgia Ry. Co.,** 43 Ga. App. 708, 711, 160 S.E. 131;

Atlantic Coast Line Railroad Co. v. **Marshall,** 89 Ga. App. 740, 81 S.E. 2d 228;

Southern Railway Company v. **Riley,** 57 Ga. App. 26, 27, 194 S.E. 422;

Pollard v. **Clifton,** 62 Ga. App. 573, 9 S.E. 2d 782.

In such cases the courts of Georgia uniformly hold that a jury verdict in favor of a plaintiff cannot stand.

Bassett v. **Callaway,** 72 Ga. App. 97, 33 S.E. 2d 112;

Evans v. **Georgia Northern R. Co.,** 78 Ga. App. 709, 52 S.E. 2d 28;

Georgia Northern R. Co. v. Stains, 88 Ga. App. 6, 75 S.E. 2d 833.

The Court of Appeals for the Fifth Circuit reviewed most of these controlling precedents and based its decision squarely on the Georgia law, as it had previously done in other cases arising under the Georgia law.

Driskell v. Powell, 67 F. 2d 484 (CA-5)

Atlantic Coast Line Railroad Co. v. Kammerer, 239 F. 2d 115, 117 (CA-5);

Vassey v. Standard Oil Co., 119 F. 2d 589 (CA-5);

Smith v. Southern Ry. Co., 53 F. 2d 186 (CA-5);

Brown v. Southern Ry. Co., 61 F. 2d 399 (CA-5).

So the Court of Appeals was completely consistent with the Georgia decisions and with its own previous rulings as respects the Georgia law.

The failure of the railroad to swear its train crew raised no presumption of negligence.

The two witnesses nearest to the accident were sworn. The engine crew was 83 cars beyond the crossing, and the rear end crew was 9 cars away. Those witnesses were present at the trial and available to Petitioners, but they chose not to call them.

The Georgia decisions clearly and positively hold that no presumption arose because of the Railroad's failure to go forward with the evidence after Petitioners closed their case.

Southern Express Co. v. B. R. Electric Co., 126 Ga. 472; 55 S.E. 254;

Gammage v. Atlantic & W. P. RR., 97 Ga. 62; 25 S.E. 207;

Davis & Hatcher v. The Central RR., 75 Ga. 645 (3).

Petitioners Can Not Be Aided by the Prima Facie Presumption Statute.

Under a prior statute the Georgia courts held that the presumption created thereby had the effect of evidence and must be considered by the jury throughout the entire trial. In 1928 this Court declared that statute unconstitutional.

Western and Atlantic R. Co. v. Henderson, 279 U. S. 639, 73 L. ed. 884.

In 1929 the Georgia Legislature enacted the so-called prima facie presumption statute (Georgia Code 94-1108), which provides that in actions against railroads for damages, proof of injury by the running of locomotives or cars shall be **prima facie** evidence of want of reasonable care on the part of the railroad. This Georgia statute is in the exact language of a Mississippi statute which was upheld by this Court in

Mobile, J & K C RR. v. Turnipseed, 219 U.S. 35, 55 L. ed. 78,

because it supplied only an inference of negligence "in the absence of other evidence to the contrary".

After the Georgia statute was enacted the Georgia Supreme Court construed it in line with the Turnipseed decision of this Court.

Seaboard Air Line Railway v. **Fountain,** 173 Ga. 593, 160 S.E. 789.

In this proceeding the trial judge assumed that the **prima facie** presumption could not be made to disappear except by evidence of the defendant and that it was necessary for the Railroad to go forward rather than rely upon the evidence introduced by the Petitioners to overcome that statutory inference. This was clearly erroneous.

There was ample evidence "to the contrary" of every allegation of negligence to dispel any "inference" and it makes no difference whether this evidence came from the plaintiffs or defendant.

In **Collier** v. **Pollard,** 60 Ga. App. 105, 2 S.E. 2d 821 (1939), relied upon by Petitioners, it was recognized:

> "* * * Of course, these defensive matters may appear from the plaintiff's own evidence, and if the plaintiff's evidence shows facts which would not authorize a recovery a non suit would be proper.* * *"

In that conventional crossing accident case the judgment of non-suit was reversed, but we are not here confronted with the factual situation present in that case.

Petitioners also rely on **Fowler** v. **Western & Atlantic R. Co.,** 75 Ga. App. 156, 42 S.E. 2d 499 (1947), where the court held:

> "* * * If the plaintiff introduced no evidence tending to support the allegations of negligence contained in the petition, the proof of injury from

the operation of the train would be sufficient to carry the case to the jury **unless the plaintiff's evidence showed non-liability on the part of the defendant as a matter of law.**" And cases cited. (Emphasis supplied)

See also:

"There is no law requiring a railroad company to introduce evidence of its own for the purpose of overcoming the statutory presumption of negligence imposed upon it by law. It may rely solely upon the evidence introduced by the plaintiff, and, if that evidence does remove the presumption, **it is not necessary for the railroad to offer further defense.**" (Emphasis supplied).

Gammage v. **Atlanta & W. P. RR. Co.**, 97 Ga. 62, 25 S.E. 207;

Atlantic Coast Line Railroad Co. v. **Taylor**, 125 Ga. 454, 455, 54 S.E. 622;

Southern Railway v. **Thompson**, 129 Ga. 367, 58 S.E. 1044

It will thus be seen that the court below correctly applied the controlling law of Georgia, and the decision is not in conflict with the decisions of the highest court of that State.

If the prima facie presumption statute of Georgia should be construed as Petitioners would like, then it would be just as unreasonable and unconstitutional as the one struck down by this court in **Western & Atlantic** v. **Henderson**, supra.

CONCLUSION

There are no "special and important" reasons for granting certiorari. A review of all the evidence (which this Court has said it should not be required to do) would only demonstrate that the decision of the Court of Appeals was rightly made in accord with the long standing and consistent rulings of the Georgia court and of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Frank G. Kurka, one of the attorneys for the Respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day mailed a copy of the foregoing brief to each of the attorneys for the Petitioners, postage prepaid, properly addressed to their regular post office address, as follows:

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